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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By JS

26910-8-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

THEODORE M. KOSEWICZ, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

HONORABLE MICHAEL P. PRICE

BRIEF OF RESPONDENT

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I.

APPELLANT'S ASSIGNMENTS OF ERROR

1. The trial court erred by giving jury instruction No. 5 defining "homicide."
2. Defense counsel provided ineffective assistance by failing to object to jury instruction No.5.
3. The trial court erred by giving jury instruction No. 13 defining kidnapping.
4. The trial court erred by giving instruction No. 14 providing the elements of kidnapping.
5. The trial court erred by entering judgment on jury verdict finding defendant guilty of Aggravated Premeditated First Degree Murder.

II.

ISSUES PRESENTED

1. Is it prejudicial error to instruct the jury regarding the definition of "homicide" as including the failure to act as a cause thereof when the defendant is charged as an accomplice to first degree murder?

2. Does it constitute ineffective assistance of counsel to fail to object to the giving of an instruction which defines "homicide" as killing a human being by failing to act?
3. Was there sufficient evidence to support the conviction of Aggravated First Degree Murder?

III.

STATEMENT OF THE CASE

The Respondent accepts the Appellant's statement of the case for purposes of this appeal.

IV.

ARGUMENT

- A. DEFENDANT HAS FAILED TO MEET THE THRESHOLD SHOWING THAT THE TRIAL COURT COMMITTED MANIFEST ERROR AFFECTING A CONSTITUTIONAL RIGHT INSTRUCTING THE JURY.

Generally, the failure to object to a trial court's jury instruction precludes appellate review. *State v. Scott*, 110 Wn.2d 682, 685-6, 757 P.2d 492 (1988). Neither the defendant nor his counsel objected to the jury instructions that he now contends were erroneous. Generally, an issue cannot be raised for the first time on appeal unless it is a manifest

error affecting a constitutional right. *See* RAP 2.5(a)(3). The applicability of RAP 2.5(a)(3) is determined by a test: (1) whether the alleged error is truly constitutional and (2) whether the alleged error is manifest. *State v. Kronich*, 160 Wn.2d 893, 899, 161 P.3d 982 (2007). An error is manifest when it has practical *and* identifiable consequences in the trial of the case. *State v. Stein*, 144 Wn.2d 236, 241, 27 P.3d 184 (2001). (Emphasis added). The defendant has not satisfied the threshold burden that the trial court committed a manifest error which affected a constitutional right and is not entitled to appellate review thereof at this point.

Defendant claims the trial court committed error of constitutional magnitude instructing the jury by giving: (1) a definition of “homicide;” (2) a definition of first degree kidnapping; and (3) the elements of first degree kidnapping. Jury instructions satisfy the constitutional demands of a fair trial, when read as a whole, the instructions provide the jury with the applicable law, are not misleading, and permit the defendant to present his theory of the case. *State v. Prado*, 144 Wn. App. 227, 241, 181 P.3d 901 (2008) (*citing State v. Mills*, 154 Wn.2d 1, 7, 109 P.3d 415 (2005); *State v. Dana*, 73 Wn.2d 533, 536-37, 439 P.2d 403 (1968)). Erroneous jury instructions are subject to *de novo* review by the appellate court. *State v. O'Donnell*, 142 Wn. App. 314, 322, 174 P.3d 1205 (2007).

1. The Trial Court Properly Exercised Its Discretion Defining Homicide In The Instructions To The Jury Based Upon Defendant's Testimony And Theory Of The Case.

It is a matter of judgment and trial court discretion whether the words used in the jury instructions require further definition. *Petersen v. State*, 100 Wn.2d 421, 440, 671 P.2d 230 (1983). Jury instruction No. 5 defined the term homicide as "the killing of a human being by the voluntary act, procurement, or failure to act of another and is either murder..." CP49. Instruction No. 5 is based upon WPIC 25.01 and provides the approved definition. Here, the trial court determined that the term "homicide" needed further definition for the jury in light of the defendant's testimony that he was merely present and did not participate in the kidnapping or the murder to cover up the kidnapping. (1/28-29/08 RP 15-45) Obviously, neither defendant nor his counsel objected to the inclusion of the definition because it had no effect on defendant's theory of the case that there was insufficient evidence of premeditation or planning of the kidnapping to render him criminally liable for the murder of Mr. Esquibel.

A jury is presumed to follow the law as instructed by the trial court. *State v. Johnson*, 124 Wn.2d 57, 77, 873 P.2d 514 (1994). Here, the instructions stated the applicable law accurately, did not mislead, and

afforded Mr. Kosewicz the basis upon which to argue his theory of the case. In fact, the jury inquired of the trial court with regard to whether an accomplice had to have knowledge of the premeditation to be held accountable for the murder. CP 51. The record reflects that the jury considered defendant's theory of the case carefully prior to entering a finding of guilty. If the jury was affected by the inclusion of a definition of homicide in its instructions, then it would have sought clarification since it did so with respect to another concept. CP 51. Clearly, the trial court's inclusion of the definition of homicide did not prevent defendant from arguing his theory of the case, did not mislead the jury, and properly advised the jury of the applicable law.

2. The Trial Court Properly Instructed The Jury Regarding The Definition Of First Degree Kidnapping In Instruction No. 13 And The Elements Of First Degree Kidnapping In Instruction No. 14.

Defendant contends that the trial court deprived him of his constitutional right to due process and a fair trial by providing the jury the means of finding him guilty based upon an uncharged alternative of first degree kidnapping. The United State and Washington State constitutions mandate that the jury be instructed regarding all essential elements of the crime charged. *State v. O'Donnell*, 142 Wn. App. at 322. Here, the trial

court instructed the jury regarding the definition and elements of first degree kidnapping based on the charging language in the amended information. The trial court's elements instruction actually charged the State with the burden of proving an alternative, additional crime that had not been charged. The inclusion of the alternative required that the jury find beyond a reasonable doubt that either alternative or both means of committing the crime had been proved. If anything, the trial court's instructions afforded a benefit that defendant could not have obtained otherwise. Finally, the record reflects that the jury was provided more than sufficient evidence to support the finding of the commission of either or both means of first degree kidnapping. Specifically, defendant's own testimony was that the purpose of taking Mr. Esquibel for a ride was to scare him into paying a debt owed to Mr. Burnham. (1/28-29/08 RP 15-45) This testimony alone would satisfy the alternative means of first degree kidnapping. Accordingly, the trial court was required to instruct on the all inclusive definition of first degree kidnapping for purposes of the murder and conspiracy charges. The inclusion of the alternative means of first degree kidnapping in the context of the charged crimes and the evidence before the jury worked to properly inform the jury of the applicable law, were not misleading, and were readily understood.

B. THE DECISION NOT TO OBJECT TO JURY INSTRUCTIONS 5, 13 AND 14 DID NOT CONSTITUTE INEFFECTIVE ASSISTANCE OF COUNSEL.

A defendant must establish that the attorney's performance was deficient and that the defendant was prejudiced by that deficiency to establish ineffective assistance of counsel. *State v. Nichols*, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007). The defendant must prove that the trial counsel's performance fell below an objective standard of reasonableness based on all the circumstances to show deficient performance. *Id.* Prejudice is established where the defendant shows that but for counsel's errors, there is a reasonable probability that the outcome of the trial would have been different. *Id.* The failure to establish either prong of the test is fatal to the claim of ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 697, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

There is a strong presumption that a trial counsel's performance was reasonable and effective. *State v. Thomas*, 109 Wn.2d at 226. A claim of ineffective assistance of counsel will not stand where the trial counsel's conduct can be characterized as legitimate trial strategy or tactics. *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996).

Here, the inquiry focuses upon whether the trial counsel's failure to object to the trial court's giving three jury instructions can be characterized as illegitimate trial strategy or tactics. A careful review of the record before the trial court and jury reveals that the defense theory of the case was that the defendant was merely a bystander who was along for the ride without any foreknowledge of what was to come. As noted, the jury instructions, read as a whole, supported such a theory of the case, did not mislead the jury, and properly advised the jury of the applicable law. There is no evidence in, or reasonable inferences to be drawn from a review of, the record to support that defendant's trial counsel was ineffective. Quite the contrary is evident from the record. The fact that the jury weighed the evidence and did not find Mr. Kosewicz's theory of the case credible does not establish that his trial counsel was ineffective.

C. THERE WAS SUFFICIENT EVIDENCE
PRODUCED AT TRIAL TO SUPPORT THE
JURY'S VERDICT FINDING THE DEFENDANT
GUILTY OF AGGRAVATED PREMEDITATED
FIRST DEGREE MURDER.

Defendant argues that the evidence of his complicity in Mr. Esquibel's kidnapping and murder was insufficient to support the jury's verdict finding the defendant guilty of first degree murder. Evidence is sufficient to support a conviction if, after reviewing the evidence in the

light most favorable to the State, any rational trier of fact could have found the essential elements proved beyond a reasonable doubt. *State v. Hendrickson*, 129 Wn.2d at 81. The elements of a crime may be established by either direct or circumstantial evidence, one type being no more valuable than the other. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Issues regarding conflicting testimony and credibility of witnesses are for the finder of fact and cannot be reviewed on appeal. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

The evidence presented at trial clearly demonstrated Mr. Kosewicz had knowledge of the “taxing” of Mr. Esquibel for a debt owed to a known drug dealer. Mr. Kosewicz himself testified that the drug dealer, Mr. Burnham called upon him to help collect the money from Mr. Esquibel. The defendant was not forced to participate in the “taxing” and took no action to either stop or disassociate himself from the actions taken against Mr. Esquibel. The record before the jury reveals that Mr. Kosewicz willingly participated in the assault, abduction and eventual murder of Mr. Esquibel. Accordingly, there was sufficient evidence to support the jury finding Mr. Kosewicz complicit in the kidnapping and murder of Mr. Esquibel.

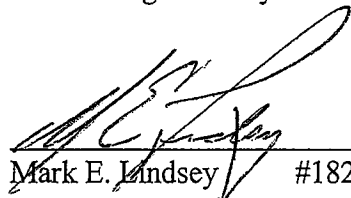
V.

CONCLUSION

For the reasons stated, the convictions and sentence should be affirmed.

Respectfully submitted this 31st day of December, 2008.

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